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No. 07-168

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In The Supreme Court of the United States

RANDY W. BLADES; DARRYLE E. BLAKE; DONALD BOST; DIANE BROOKS; GINA M. CANNON; MICHAEL W. CICHOWICZ; DAVID F. CLAUSS; LAVINA DAVIS; JUANITA DEBELLOTTE; TIMOTHY GODWIN; ALICE GOODMAN; GOODMAN SHARON; JOSEPH HANDS; JOSEPHINE KENNEDY; DEREK LEDBETTER; WILLIAM B. MCKITRICK; THOMAS MILLER; WENDELL MILLER; KEVIN NIEBUHR; SHIRLEY ONYANGO; KEITH OWENS; DOROTHIA PARKER-BELL; IRMA D. REED; FREDERICK V. ROUSSEY; SHARI TAYLOR-DORSEY; DAVID M. WERNER; DENISE WILKES; MELISSA D. WILLIAMS,

Petitioners,

v.

LEONARD HAMM; SEAN MALONE; THE BALTIMORE CITY POLICE DEPARTMENT; MAYOR OF BALTIMORE; CITY COUNCIL OF BALTIMORE CITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I. Whether reasonable accommodation was properly denied to Petitioners, who were capable of performing the essential duties of their restructured or modified job duties and/or reassignment as full time police officers, and thus, their employer's policy denying them any continued employment for failing to meet the essential duties of their employment similarly to non disabled police officers was per se unconstitutional under the ADA?

II. Whether it was unconstitutional for the district court to use Rule 56, Federal Rules of Civil Procedure, to deny Petitioners' substantive rights to a jury trial over their claims under the ADA?

STATEMENT PURSUANT TO RULE 14.1(b)

The caption of the case contains the names of all parties who have filed their petition for writ of certiorari to the decision of the Fourth Circuit Court of Appeals in this case.[1]

[1] Steven W. Allen and Bryan Bessling, were parties represented by different counsel in this case at both the district court level and Fourth Circuit Court of Appeals. They have not joined in this petition for writ of certiorari. Appx. at 3.

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STATEMENT PURSUANT TO RULE 14.1(d)

The memorandum opinion of the district court was entered on February 22, 2006. Appendix ("Appx.") at 9. *Allen Et Al. v. Hamm*, ___ F. Supp. 2d ___, 2006 WL 436054 (D. Md. 2006) (unpublished). The judgment and mandate of the Fourth Circuit Court of Appeals was entered on May 10, 2007. App. at 1. *Allen Et Al. v. Hamm*, ___ Fed. Appx. ___, 2007 WL 1430219 (4th Cir. 2007) (unpublished).

STATEMENT OF JURISDICTION

Petitioners, Michael W. Cichowicz, David F. Clauss, William B. McKitrick, and Kevin Niebuhr, by their undersigned counsel, seek review in this Court by their petition for writ of certiorari to the May 10, 2007 mandate issued by the Circuit Court of Appeals for the Fourth Circuit in this case. No petition for rehearing or rehearing en banc was filed. Petitioners have timely filed their petition for writ of certiorari within ninety (90) days of the final decision of the Fourth Circuit Court of Appeals. Jurisdiction in the district court was established under 28 U.S.C.A. § 1331 and § 1343(a)(4). Jurisdiction in the Fourth Circuit was established pursuant to 28 U.S.C.A. § 1291. Jurisdiction in this Court is established under 28 U.S.C.A. § 1254(1). Rule 29.4 is inapplicable to this case.

STATEMENT PURSUANT TO RULE 14.1(f)

The 7th Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the

right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

28 U.S.C.A § 2072 provides:

Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

42 U.S.C.A. § 2000e-2(a) provides :

Employer practices.

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 1981a(a)(2) provides:

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of

> section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C.A. § 1981a(a)(3) provides:

> Reasonable accommodation and good faith effort.
>
> In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C.A. § 1981a(c)(1) provides:

> Jury trial.
>
> If a complaining party seeks compensatory or punitive damages under this section--

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

42 U.S.C.A. § 12111(8) provides:

Qualified individual with a disability.

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

42 U.S.C.A. § 12111(9) provides:

Reasonable accommodation.

The term "reasonable accommodation" may include-- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or

modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C.A. § 12112(a) provides:

(a) General rule.

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C.A. § 12113 provides:

Defenses.

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

Rule 38, Fed. R. Civ. Proc., provides in relevant part:

> Jury Trial of Right.
>
> (a) Right Preserved.
>
> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 39, Fed. R. Civ. Proc., provides in relevant part:

> Trial by Jury or by the Court.
>
> (a) By Jury.
>
> When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

Rule 56, Fed. R. Civ. Proc., provides in relevant part:

> Summary Judgment.
>
> (a) For Claimant.
>
> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party.
>
> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon.
>
> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

...

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

...

STATEMENT OF THE CASE

The issue presented by Petitioners in this case is whether reassignment, or job restructuring and/or modification under the Americans with Disabilities Act of 1990, as amended, ("ADA") was mandated since Petitioners were "otherwise qualified" disabled employees who could perform the essential functions of their employment, but could not do so without reasonable accommodation. The second issue presented is whether Petitioners should have had their genuinely disputed issues of material fact decided by a jury instead of the presiding judge as a matter of substantive federal law. The U.S. District Court for Maryland, Northern Division was the court of first instance, and had *de novo* federal question jurisdiction over Petitioners' claims under 28 U.S.C.A. § 1331 and § 1343(a)(2). The district court denied all relief to Petitioners. The Court of Appeals for the Fourth Circuit affirmed the district court's decision. This petition is now appropriate for review by this Court under 28 U.S.C.A. § 1254(1).

In this case, Petitioners were all formerly employed by the Baltimore City Police Department ("BCPD"). Appx. at 15-17. All suffered some type of on the job injury causing them to be disabled and/or perceived disabled by the BCPD. *Id.* Petitioners worked for the BCPD for numerous years in permanent light duty assignments as a form of reasonable accommodation. *Id.* However, in 2005, the Commissioner of the BCPD, Leonard Hamm ("Hamm")[2], denied Petitioners any further or continued employment through reassignment or job restructuring and/or modification as reasonable accommodation. *Id.* at 4. Hamm determined that all Petitioners were required to be able to forcibly arrest any criminal suspect, drive a police vehicle under emergency conditions, and fire a weapon of deadly force to continue to remain employed at the BCPD. *Id.* This was despite the fact Petitioners were already working in their permanent, light duty jobs successfully, some for over a decade. Appx. 15-17. Hamm required Petitioners to meet his new definition of essential job duties without regard to whether Petitioners would thereby be no longer able to be reasonably accommodated in their employment as a direct consequence. As a result of Hamm's policy, Petitioners were instantly unable to meet the essential duties of their employment similarly to non-disabled police officers, and accordingly, all Petitioners were ultimately forced into involuntary retirement. Appx. 9-10, 12-13. Hamm never presented any undue burden or business necessity defenses to demonstrate that Petitioners' permanent

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[2] Hamm resigned his position as Commissioner of the BCPD on or about July 17, 2007. Frederick A. Bealefeld, III is currently the Acting Commissioner of the BCPD.

light duty employment could not be continued, and/or, that Petitioners could not perform the essential duties of their modified or restructured job duties and/or reassignment at the BCPD. Hamm also never presented any admissible evidence to demonstrate that the BCPD could not engage in any direct interactive process with Petitioners for further job restructuring or modification and/or reassignment within the BCPD. Appx. 39-41, *see also, id.* at Fn 16. ("Plaintiff McKitrick contends that the Police Department "never attempted to determine how many light duty positions doing police work could remain open on a permanent basis."). (internal quotation omitted).

The district court ultimately decided that reassignment, as a form of reasonable accommodation, was unavailable to Petitioners in this case because Petitioners could no longer perform the essential functions of their employment as determined by Hamm without reasonable accommodation. Appx. at 40-41. This decision effectively denied Petitioners their rights to receive any job restructuring or modified duties, and/or, reassignment as reasonable accommodation as "otherwise qualified" disabled employees unable to meet the essential functions of their employment without reasonable accommodation. This was true despite the lack of any undue burden or business necessity defense presented by the BCPD. This legal precedent upheld by the Fourth Circuit is contrary to all other Circuit Courts of Appeal which have decided the same legal issue differently than the Fourth Circuit. All other Courts of Appeal would require Hamm either to continue Petitioners in their

current reassignments, and/or, would require Hamm to offer Petitioners job restructuring and/or modified duties as reasonable accommodation, despite the fact that Petitioners would not be able to meet the essential functions of their employment without reasonable accommodation similarly to non disabled officers. The distinction made only by the Fourth Circuit is a significant split from all other Circuit Courts of Appeal. This Court should grant Petitioners' writ of certiorari to the Fourth Circuit in order to resolve and settle this matter.

Finally, Petitioners argued that they had the right to a jury trial over all of their claims since their claims involved genuinely disputed issues of material fact, and only a jury could resolve any ultimate questions of intentional discrimination and/or disparate impact. Petitioners argue that their fundamental and substantive legal rights were unnecessarily taken from them by the district court in violation of the Seventh Amendment to the U.S. Constitution.

ARGUMENT

I. Fourth Circuit precedent that denies Petitioners their rights to reassignment or job restructuring and/or modification as reasonable accommodation under the ADA mandates reversal.

Under 42 U.S.C.A. § 12111(8), the legal analysis for claims of employment discrimination against the disabled is a straightforward one. To resolve the question whether a person is an "otherwise qualified individual," a court must first

consider whether that person is able to perform the essential functions of the job held or desired. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987). However, if the affected employee is unable to perform the essential functions of the job held or desired, then the reviewing court must nevertheless determine whether the disabled person could do the job with reasonable accommodation. *Id.* It is clear that an employer is not required to accommodate an employee through the creation of new job duties or a new reassignment that would eliminate the essential job functions of the employment the "otherwise qualified" employee currently holds or desires. *Allen Et al. v. Hamm*, 2006 WL 436054 1, 11 (D. Md. 2006), (unpublished), *aff'd.*, *Allen Et al. v. Hamm*, 2007 WL 1430219 (4th Cir. 2007). (unpublished). However, in this case Petitioners requested reasonable accommodation for jobs they were already performing and which were created specifically because of their disabilities. Appx. at 39-41. It is well settled that under the ADA, Hamm had a mandatory duty to consider whether reassignment to any vacant police jobs for Petitioners was possible, and/or, whether restructured or modified job duties was available for Petitioners. 42 U.S.C.A.§ 12111(8). Petitioners were employed persons entitled to strict scrutiny of their claims that they suffered disparate treatment and impact by not being reasonably accommodated. *See Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154, 1170 (10th Cir. 1999). (Case citations therein omitted). It is clear that a majority of the Circuit Courts of Appeal would require Hamm either to transfer Petitioners to any vacant positions within the BCPD, where they could perform the essential functions of the proposed

reassignment, and/or, would require Hamm to offer Petitioners modified or restructured jobs, despite the fact Petitioners would not be able to perform the essential functions of their employment similarly to non disabled police officers. This is because no undue burden or business necessity is applicable and the proposed accommodation is reasonable. *Id.*

The accommodations requested by Petitioners were entirely reasonable. *See* 42 U.S.C.A. § 12111(9)(B). *Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996). *See also, Smith,* 180 F.3d at 1161. (Our reading of "qualified individual with a disability" to include individuals who can perform an appropriate reassignment job within the company, with or without reasonable accommodation, even though they cannot perform their existing job no matter how much accommodation is extended, is supported by nearly every circuit that has explicitly or implicitly considered the issue.") (all caselaw citations to 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and D.C. Circuit Courts of Appeal decisions therein omitted), (additional emphasis added); *Accord*, *Daugherty v. City of El Paso*, 56 F.3d 695, 699 (5th Cir. 1995), *cert. denied*, *Daugherty v. City of El Paso, Texas*, 516 U.S. 1172 (1996). (The broad scope of prohibition against discrimination found in 42 U.S.C.A. § 12112(a) "extends not only to hiring and job application procedures, but to advancement, discharge of employees, "and other terms, conditions, and privileges of employment.").

Only the Fourth Circuit has made it perfectly clear that the duty of reasonable accommodation does not extend or encompass any responsibility by an employer to provide an otherwise qualified

disabled employee with mandatory, alternative employment choices, where the disabled employee is unable to meet the essential job functions of his or her existing position without reasonable accommodation. *Allen*, 2006 WL 436054 at 8, 2007 WL 1430219; *Lassiter v. Reno*, 86 F.3d 1151 (Table), 1996 WL 281933 at 1, 7 (4th Cir. 1996) (unpublished), *cert. denied*, *Lassiter v. Reno*, 519 U.S. 1091 (1997); *See also Guillot v. Garrett*, 970 F.2d 1320, 1327 (4th Cir. 1992) ("[A]n employer may not forbid an employee who is unqualified for the position he currently holds from availing himself of other "employment opportunities" (i.e., transfer or reassignment) that are available under the employer's "existing policies."); *Johnson v. State of Md.*, 113 F.3d 1232 (4th Cir. 1997) (unpublished); *Carter v. Tisch*, 822 F.2d 465, 468 (4th Cir. 1987) ("There is nothing in the law or ... regulations to suggest that reasonable accommodation requires an agency to reassign an employee to another position."); *Accord*, *Scott v. Montgomery County Government*, 164 F. Supp. 2d 502, 507 (D. Md. 2001).

The Fourth Circuit is clearly out of step with the mandatory requirements of the ADA. 42 U.S.C.A. § 12111(9)(B). Reassignment, job restructuring, and/or modified job duties are mandatory for any employer to consider and offer to disabled employees, unless these forms of reasonable accommodation would ultimately cause the employer an undue hardship. *Id.* Since Petitioners claimed disparate impact, Hamm also had a duty to show business necessity negated any disproportionate impact on Petitioners' protected group, and/or, that an undue burden would occur if Petitioners were

accommodated as they requested. *See Smith*, 180 F.3d at 1170.

In this case, the lower court determined that:

> The issue in this case is whether officers are *capable* of performing certain fundamental job functions, not whether they have in fact been required to do so. No reasonable jury could find that the Police Department exceeded the broad bounds afforded it under the ADA to decide as an employer that being capable of making forcible arrests, driving vehicles under emergency conditions, and firing weapons of deadly force are essential qualifications for serving as a police officer.

Allen, 2006 WL 436054 at 8.

The lower court acknowledged that Petitioners' requested accommodation was to continue their employment in their permanent light duty positions. *Id.* at 11. ("Plaintiffs seek [ ] to continue to work in their permanent, light duty positions."). (emphasis supplied). However, the lower court held, "[t]his is not a "reasonable accommodation" because permanent, light duty positions would effectively eliminate the essential functions of making a forcible arrest, operating a vehicle under emergency conditions, and firing a weapon." *Id.* Thus, the lower court held "that no reasonable jury could find that Plaintiffs are "otherwise qualified" individuals with a disability entitled to protection under the ADA. *Id.*

However, all Petitioners were able to meet the essential functions of their modified and/or restructured jobs or reassignments as permanent light duty, police officers within the BCPD. Moreover, Hamm never pled any undue burden and/or business necessity defense at any relevant time. He also never pled that Petitioners' requested accommodation was facially unreasonable. Instead, Hamm's decision only negatively reinforced his improper decision to terminate his disabled officers who were making significant contributions as police officers to the BCPD. Petitioners had a statutory right to being reasonably accommodated for their actual or perceived disabilities. It follows that the only genuinely disputed issue in this case was whether the ADA mandated that Hamm should have continued to offer modified or restructured job duties to Petitioners, and/or, whether he engaged in any good faith efforts prior to denying any reasonable accommodation to Petitioners. 42 U.S.C.A. § 12111(9)(B); 42 U.S.C.A. § 1981a(a)(3).

The Fourth Circuit did not properly decide Petitioner's claims because the lower court's unpublished, per curiam decision never addressed whether the Fourth Circuit's own precedent was substantively inapposite to the ADA's express provisions of requiring reasonable accommodation to "otherwise qualified" individuals. The lower court's decision expressly conflicts with the vast majority of all other Circuit Courts of Appeal over this genuinely disputed issue.

The Fourth Circuit's decision cannot stand as a matter of law because it would allow any police commissioner, through the simple alteration of

essential job duties, to deny only disabled employees from their continued employment, which has occurred in this case. This unlawful practice clearly subverts and nullifies the express, remedial intent of the ADA, which was written to prohibit any and all forms of discrimination against the disabled similarly to the manner demonstrated by Hamm in this case. The lower court's determination that Petitioners were not entitled to reassignment, restructured and/or modified job duties as a reasonable accommodation, solely because they could not allegedly perform the essential duties of their former employment at the BCPD without reasonable accommodation was *per se* improper. 42 U.S.C.A. § 1981a(a)(3); 42 U.S.C.A. § 12113. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). The Fourth Circuit is the only jurisdiction that continues to allow an employer to deny reasonable accommodation to disabled employees in this manner. The High Court must therefore resolve the fundamental split among the Fourth Circuit with all other Circuit Courts of Appeal over this issue.

II. Summary Judgment was unconstitutionally applied to Petitioners in this case.

It is undisputed that Petitioners had a right to a jury trial over their claims. *See Colgrove v. Battin*, 413 U.S. 149, 161 (1973). 28 U.S.C.A § 2072(b) specifically provides in relevant part that the federal rules of civil procedure shall "not abridge, enlarge or modify any substantive right." *Id.* Petitioners prayed a jury trial in this case arguing for compensatory and punitive damages. 42 U.S.C.A. § 1981a(c)(1). This was a guaranteed right that they did not waive. The district court's denial of Petitioners' rights to

have a jury decide their claims was inconsistent with an express Congressional mandate assuring such rights, and thus, was inappropriate under Rule 56. *See Pandazides v. Virginia Bd. of Education*, 13 F.3d 823, 832-33, (4th Cir. 1994). There were genuinely disputed material facts by the parties as to the critical issue of whether Hamm intentionally and unlawfully was motivated by Petitioners' disabilities, when he denied them their continued employment, and/or, denied them any further reasonable accommodation. The material and dispositive evidentiary facts in the record, and all competing reasonable inferences and conclusions to be drawn from the facts had to be decided in favor of Petitioners as the non moving party under Rule 56. *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir.1979) (cases therein omitted). 981 F.2d 160, 163; *Accord, Thompson Everett, Inc. v. National Cable Advertising, L.P.* 57 F.3d 1317, 1323 (4th Cir. 1995). It was also mandatory for the lower court to "draw any permissible inference[s] from the underlying facts in the light most favorable to [Petitioners]." *Id., quoting Tuck v. Henkel Corp.*, 973 F.2d 371, 374 (4th Cir. 1992), *cert. denied, Tuck v. Henkel Corp.*, 507 U.S. 918, (1993), while also ensuring that any such competing inferences from the evidence fell "within the range of reasonable probability and not be so tenuous as to amount to speculation or conjecture." *Thompson Everett, Inc.*, 57 F. 3d at 1323, *quoting*, *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810, 817 (4th Cir. 1995). *See also, Adickes v. S. H. Kress & Co.*, 398 U.S. 144. 157 (1970).

Disparate treatment and impact claims are cognizable under the ADA. *Raytheon*, 540 U.S. at 53. (cases citations therein omitted). "Disparate treatment ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, [age, or disability]. An employer can thus be held liable if motivated in whole or in part by unlawful discrimination." *Id.* at 52. (additional references added). To allege disparate treatment, Petitioners need to demonstrate with direct or circumstantial evidence that Hamm's subjective intent was improperly motivated in whole or in part by unlawful discrimination. *Id.* Under a mixed-motive analysis, it is normally sufficient for Petitioners to demonstrate with a preponderance of admissible evidence that Hamm was motivated to take his adverse employment action against them for both permissible and forbidden reasons. *Hill v. Lockheed Martin Logistics Mgt. Inc.*, 354 F.3d 277, 284 (4th Cir. 2004), *cert. denied*, *Hill v. Lockheed Logistics Mgt. Inc.*, 543 U.S. 1132 (2005) (all case citations therein omitted). Hamm would then have to show with material evidence that he would have taken the same action against Petitioners absent any discriminatory motive in order to avoid liability. *Id.*

Petitioners can also show discrimination with indirect or direct evidence demonstrating that (1) they are members of a protected class, (2) an adverse employment action was taken against them, and (3) a causal relationship exists between the adverse action taken and unlawful discrimination. Hamm must then proffer a legitimate, non discriminatory

reason for his adverse employment action taken against Petitioners. This reason must be sufficiently rebutted by Petitioners with probative evidence of discriminatory intent by Hamm to establish a prima facie case to be submitted to a jury for final resolution. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 800-01 (1973); *Texas Dept of Community Affairs v Burdine,* 450 U.S. 247, 255 (1981).

To avoid summary judgment of their disparate treatment claims under precedent set in the Fourth Circuit, Petitioners also had to "produce direct evidence of a stated purpose to discriminate and/or [indirect] evidence of sufficient probative force to reflect a genuine issue of material fact. What is required is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Rhoads v F.D.I.C.*, 257 F.3d 373, 391-392 (4th Cir. 2001), *on remand*, *Rhoads v. F.D.I.C*, 2002 WL 31755427 (D. Md. 2002). (unpublished).

In contrast, Petitioners' disparate impact claim involves their dispute that Hamm engaged in "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Under a disparate-impact theory of discrimination, "a facially neutral employment practice may be deemed [illegally discriminatory] without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case." *Raytheon*, 540 U.S. at 52-53. A disparate impact claim requires no showing of discriminatory intent. *Id.*

Regardless of either theory of relief available to Petitioners, it is well settled that the ultimate determination of intentional discrimination must be left to the jury to decide. Whether Petitioners were able to perform the essential functions of their employment, whether Petitioners' requests for reassignment, job restructuring and/or modification were reasonable accommodations under the ADA, and whether Hamm's rejection of Petitioners' requests to be accommodated in order to continue in their employment statuses at the BCPD, were all ultimate questions to be decided only by the trier of facts. *See, e.g.*, 2002 WL 31755427at 2. ("Defendant FDIC concedes that there is a right to a trial by jury if there is a right to compensatory damages."); *Raytheon*, 540 U.S. at 53. ("Thus, the only relevant question before the Court of Appeals, after petitioner presented a neutral explanation for its decision not to rehire respondent, was whether there was sufficient evidence from which a jury could conclude that petitioner did make its employment decision based on respondent's status as disabled despite petitioner's proffered explanation."). (additional emphasis added); *Pullman-Standard v. Swint*, 456 U.S. 273, 285 (1982) ("Although discrimination vel non is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by 42 U.S.C.A. § 2000e-2(a). As such, a finding of discrimination or non-discrimination is a finding of ultimate fact.") (internal citations therein omitted). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return

a verdict for the nonmoving party."). *Pandazides*, 13 F.3d at 833 ("Determining the issues of who is an otherwise qualified individual with a disability and whether an accommodation requested by an individual was reasonable are questions of fact.").

As a matter of law, the district court should not have decided Petitioners' claims instead of the jury. This substantive omission was directly in violation of federal statutory law, and Rules 38-39, Fed. R. Civ. Proc., because no waiver by Petitioners of their rights to a jury resolution of their claims was applicable in this case. *Manaia v. Potomac Elec. Power Co.*, 268 F.2d 793, 799 (4th Cir. 1959) *cert. denied*, *Manaia v. Potomac Electric Power Company*, 361 U.S. 913 (1959) (Were a court indifferent to the established basis upon which powers have been allocated between the court and jury or beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred.); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). (Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.).

It was entirely unconstitutional for the district court to have denied Petitioners their substantive rights. The district court's use of summary judgment was unnecessarily applied because genuinely disputed issues of material fact demonstrated Petitioners suffered disparate treatment and impact. *See, e.g*, *Pandazides*, 13 F.3d

at 832; 42 U.S.C.A. § 1981a(c)(1) (Congress specifically established a right to a jury trial under 42 U.S.C.A. § 1981a, effective November 12, 1991). Raising this well settled principle in the context of a motion for judgment notwithstanding the verdict, filed by the employer in that case, this Court held that after a jury verdict, a district court judge is then only empowered to decide whether "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). (additional emphasis added). *Accord*, *Desert Palace v. Costa*, 539 U.S. 90, 95 (2003).

Here, the district court unnecessarily abrogated the role of the jury by applying the rule of summary judgment. Hamm never presented any admissible evidence to demonstrate the absence of genuinely disputed facts regarding Petitioners' requests to continue their restructured or modified permanent light duties, and/or, to be reassigned within the BCPD as reasonable accommodation for their disabilities. Hamm never presented any counter argument to Petitioners' claims that disparate impact was shown by Hamm's policy, since the policy solely and negatively affected only his disabled police officers. Moreover, Petitioners sought discovery to uncover the fact that Hamm's non disabled police officers were not required by Hamm to forcibly chase down any criminal suspects, drive a police car under emergency conditions, and fire a weapon of deadly force in order to remain employed,

unlike Petitioners.[3] By conducting a bench trial instead of a jury trial, the district court improperly used the rule of summary judgment to unconstitutionally deny Petitioners their federally mandated rights to have their arguments heard by the trier of facts. *See* Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, Virginia Law Review, Vol. 93 (2007), p. 8. The application of Rule 56 was never been meant to conflict with the substance of the English common law assuring that a right to a jury trial for legal damages was never meant to be arbitrarily denied. *See* Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, Virginia Law Review, Vol. 93 (2007), p. 8, *citing*, *The Seventh Amendment, Modern Procedure and the English Common Law*, 82 WASH. U. L.Q. 687, 695-701 (2004) (S. Thomas).

The district court has never been enabled by this Court to use the federal rules of civil procedure to deny Petitioners' substantive rights. In fact, no lower court may properly use rules of federal procedure to deny the substantive or fundamental rights. This kind of judicial practice has never been upheld as constitutional by this Court. *See Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320

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[3] Petitioners' rule 56(f) affidavit to obtain material evidence on this issue would have unearthed material facts relevant to Hamm's policy changes regarding non disabled and disabled employees' abilities to make forcible arrests, operate a vehicle under emergency conditions, and fire a deadly weapon in order to maintain their employment with the BCPD. The lower court's denial of discovery over the material disputed facts was thus unnecessarily applied. *See Temkin v Frederick County Commissioners*, 945 F.2d 716, 718-719 (4th Cir. 1991) *cert denied*, 502 U.S. 1095 (1992).

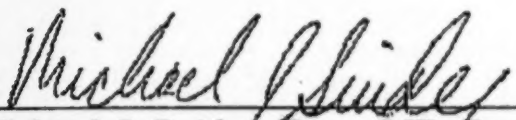
(1902); *Accord, Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2503 (2007). As this Court recently decided, "[i]t is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of - including the pleading and proof requirements for - [intentional discrimination claims]. This Court has never questioned that authority in general, or suggested, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims. Provided that [Petitioners] have satisfied the congressionally "prescribe[d] ... means of making an issue," the case will fall within the jury's authority to assess the credibility of witnesses, resolve genuine issues of fact, and make the ultimate determination whether [Hamm and], by imputation, [the BCPD] acted with [an unlawful intent or motivation to discriminate.]". *Id.* (emphasis added, case citation to *Fidelity* therein omitted, and additional references supplied).

CONCLUSION

This Court should grant Petitioners' writ of certiorari to the Fourth Circuit because the genuine issues presented in this petition legitimately deal with matters of extreme and grave importance to the federal judiciary and the public. This Court can and should resolve the apparent split in authority among the Fourth Circuit with all other Circuit Courts of Appeal regarding Petitioners' claims of disparate treatment and impact based on disability, and their rights to reasonable accommodation under the ADA. Moreover, this Court should settle any controversy of the parties involving Petitioners' rights to a jury trial determination of their substantive claims,

which was unconstitutionally abridged by the lower courts. Petitioners' fundamental rights should never be arbitrarily denied, and no persons subject to the laws of the United States should ever be denied the fair and objective scrutiny of their legal claims involving unlawful discrimination. Petitioners should be given their full panoply of rights secured by the Constitution, Congressional statutory authority, and this Court's legal precedents. This Court should summarily reverse the decision of the Fourth Circuit, remand this case back to that Court, and give instructions to that Court to remand this case to the district court for pre-trial discovery, and thereafter, a full trial on the merits of Petitioners' substantive claims.

Respectfully submitted,



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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1379

[ENTERED MAY 10, 2007]

STEVEN W. ALLEN; BRYAN BESSLING,

Plaintiffs - Appellants,

and

RANDY W. BLADES; DARRYLE E. BLAKE; DONALD BOST; DIANE BROOKS; GINA M. CANNON; MICHAEL W. CICHOWICZ; DAVID F. CLAUSS; LAVINA DAVIS; JUANITA DEBELLOTTE; TIMOTHY GODWIN; ALICE GOODMAN; SHARON GOODMAN; JOSEPH HANDS; JOSEPHINE KENNEDY; DEREK LEDBETTER; WILLIAM B. MCKITRICK; THOMAS MILLER; WENDELL MILLER; KEVIN NIEBUHR; SHIRLEY ONYANGO; KEITH OWENS; DOROTHIA PARKER-BELL; IRMA D. REED; FREDERICK V. ROUSSEY; SHARI TAYLOR-DORSEY; DAVID M. WERNER; DENISE WILKES; MELISSA D. WILLIAMS,

Plaintiffs,

versus

LEONARD HAMM; SEAN MALONE; THE BALTIMORE CITY POLICE DEPARTMENT; MAYOR OF BALTIMORE; CITY COUNCIL OF BALTIMORE,

Defendants - Appellees.

No. 06-1380

MICHAEL W. CICHOWICZ; DAVID F. CLAUSS; WILLIAM B. MCKITRICK; KEVIN NIEBUHR,

Plaintiffs - Appellants,

and

STEVEN W. ALLEN; BRYAN BESSLING; RANDY W. BLADES; DARRYLE E. BLAKE; DONALD BOST; DIANE BROOKS; GINA M. CANNON; LAVINA DAVIS; JUANITA DEBELLOTTE; TIMOTHY GODWIN; ALICE GOODMAN; SHARON GOODMAN; JOSEPH HANDS; JOSEPHINE KENNEDY; DEREK LEDBETTER; THOMAS MILLER; WENDELL MILLER; SHIRLEY ONYANGO; KEITH OWENS; DOROTHIA PARKER-BELL; IRMA D. REED; FREDERICK V. ROUSSEY; SHARI TAYLOR-DORSEY; DAVID M. WERNER; DENISE WILKES; MELISSA D. WILLIAMS,

Plaintiffs,

versus

LEONARD HAMM; SEAN MALONE; THE BALTIMORE CITY POLICE DEPARTMENT; MAYOR OF BALTIMORE; CITY COUNCIL OF BALTIMORE,

Defendants - Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge.
(1:05-cv-00879-RDB)

Submitted: March 30, 2007 Decided: May 10, 2007

Before WILKINS, Chief Judge, and GREGORY and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Michael J. Snider, Ari Taragin, Jeffery C. Taylor, SNIDER & ASSOCIATES, L.L.C., Baltimore, Maryland, for Appellants Michael W. Cichowicz, David F. Clauss, William B. McKitrick, and Kevin Niebuhr; Morris E. Fischer, Bethesda, Maryland, for Appellants Steven W. Allen and Bryan Bessling. Ralph S. Tyler, City Solicitor, BALTIMORE CITY DEPARTMENT OF LAW, Baltimore, Maryland; Karen Stakem Hornig, Chief Legal Counsel, OFFICE OF LEGAL AFFAIRS, Baltimore Police Department, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Baltimore City police officers Steven Allen, Bryan Bessling, Michael Cichowicz, William McKitrick, David Clauss, and Kevin Niebuhr (collectively, "Appellants") appeal an order of the district court granting summary judgment to the Baltimore City Police Department and other individuals and entities (collectively, "the City"). Finding no error, we affirm.

I.

In March 2005, the City, acting in consultation with the Fraternal Order of Police, adopted General Order Q-23. The purpose of General Order Q-23 was to address the manpower shortage resulting from the fact that approximately five percent of the City's police officers were unavailable for full-duty police work due to permanent injuries or chronic medical conditions. The General Order states that there are no permanent light-duty positions for Baltimore City police officers and provides that "[a]ll sworn members of the Department are required to be capable of performing the full duties and law enforcement responsibilities of a sworn member to include the ability to make forceful arrests, to drive vehicles under emergency conditions, and to qualify with a weapon." J.A. 63.

Appellants, who had been assigned to light-duty positions due to injuries or medical conditions, were all informed that pursuant to the policy, they must either return to full-duty status or apply for retirement benefits. They subsequently brought this action alleging that they were victims of discrimination in violation of the Americans with

Disabilities Act of 1990 and the Rehabilitation Act of 1973. The district court denied Appellants' request to conduct discovery and granted summary judgment to the City.

II.

We conclude that the district court correctly decided the issues before it. Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before us and oral argument would not aid the decisional process.

AFFIRMED

JUDGMENT

FILED: May 10, 2007

[ENTERED MAY 10, 2007]

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 06-1379
1:05-cv-00879-RDB

STEVEN W. ALLEN; BRYAN BESSLING

Plaintiffs - Appellants

and

RANDY W. BLADES; DARRYLE E. BLAKE; DONALD BOST; DIANE BROOKS; GINA M. CANNON; MICHAEL W. CICHOWICZ; DAVID F. CLAUSS; LAVINA DAVIS; JUANITA DEBELLOTTE; TIMOTHY GODWIN; ALICE GOODMAN; GOODMAN SHARON; JOSEPH HANDS; JOSEPHINE KENNEDY; DEREK LEDBETTER; WILLIAM B. MCKITRICK; THOMAS MILLER; WENDELL MILLER; KEVIN NIEBUHR; SHIRLEY ONYANGO; KEITH OWENS; DOROTHIA PARKER-BELL; IRMA D. REED; FREDERICK V. ROUSSEY; SHARI TAYLOR-DORSEY; DAVID M. WERNER; DENISE WILKES; MELISSA D. WILLIAMS

Plaintiffs

v.

LEONARD HAMM; SEAN MALONE; THE BALTIMORE CITY POLICE DEPARTMENT; MAYOR OF BALTIMORE; CITY COUNCIL OF BALTIMORE

Defendants - Appellees

No. 06-1380
1:05-cv-00879-RDB

MICHAEL W. CICHOWICZ; DAVID F. CLAUSS; WILLIAM B. MCKITRICK; KEVIN NIEBUHR

Plaintiffs - Appellants

and

STEVEN W. ALLEN; BRYAN BESSLING; RANDY W. BLADES; DARRYLE E. BLAKE; DONALD BOST; DIANE BROOKS; GINA M. CANNON; LAVINA DAVIS; JUANITA DEBELLOTTE; TIMOTHY GODWIN; ALICE GOODMAN; GOODMAN SHARON; JOSEPH HANDS; JOSEPHINE KENNEDY; DEREK LEDBETTER; THOMAS MILLER; WENDELL MILLER; SHIRLEY ONYANGO; KEITH OWENS; DOROTHIA PARKER-BELL; IRMA D. REED; FREDERICK V. ROUSSEY; SHARI TAYLOR-DORSEY; DAVID M. WERNER; DENISE WILKES; MELISSA D. WILLIAMS

Plaintiffs

v.

LEONARD HAMM; SEAN MALONE; THE BALTIMORE CITY POLICE DEPARTMENT; MAYOR OF BALTIMORE; CITY COUNCIL OF BALTIMORE

Defendants - Appellees

Appeal from the United States District Court for the District of Maryland at Baltimore

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

_____

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[ENTERED FEBRUARY 22, 2006]

STEVEN ALLEN, *et al.*,

Plaintiffs,

v.

LEONARD HAMM, *et al.*,

Defendants.

Civil Action No.: RDB 05-879

MEMORANDUM OPINION

This action arises out of a complaint filed by Baltimore City police officers Steven Allen, Bryan Bessling, Michael Cichowicz, William McKitrick, David Clauss, and Kevin Niebuhr ("Plaintiffs") against Leonard Hamm, Commissioner of the Baltimore City Police Department, Sean Malone, Interim Labor Commissioner of Baltimore City, George Balog, Director of the Department of Public Works, the Baltimore City Police Department, the Mayor of Baltimore, and the City Council of Baltimore ("Defendants").[1] The complaint alleges that Defendants wrongfully discriminated against Plaintiffs on the basis of actual or perceived

[1] Leonard Hamm, Sean Malone, and George Balog are named only in their official capacities. (*See* Am. Comp. ¶¶ 18-20.)

disabilities in violation of the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA"). Presently pending before this Court are cross-motions for summary judgment filed by the parties. Defendants argue that they are entitled to judgment as a matter of law because Plaintiffs cannot perform the essential functions of a Baltimore City police officer, *i.e.*, making a forcible arrest, firing a weapon of deadly force, and driving a vehicle under emergency conditions. The parties' submissions have been reviewed and a hearing was conducted on February 10, 2006. For the reasons that follow, Defendants' Motion for Summary Judgment is GRANTED and Plaintiffs' Cross-Motion for Summary Judgment is DENIED.

BACKGROUND

I. The Police Department's Light-Duty Policy.

In the fall of 2003, a meeting was held to discuss the development of a Maintenance Program for Limited/Light-Duty Personnel (the "Light-Duty Policy") for police officers in the Baltimore City Police Department (the "Police Department"). (*See* Malone Affidavit ¶ 4.) The purpose of this policy was to address a manpower shortage caused by the fact that approximately 169 police officers—or five percent of the police force—were not available for full-duty police work "due to chronic medical conditions and/or injuries of a permanent nature." (*Id.*) Attending the meeting were representatives from the Police Department, the Baltimore City Fraternal Order of Police Lodge #3 ("Fraternal Order

of Police"), the Baltimore Police and Fire Pension System, the City Solicitor's Office, Mercy Medical Clinic, and the Labor Commissioner's Office. (*Id.* at ¶ 5.)

In August of 2004, after several meetings between the Fraternal Order of Police and the Police Department, the Light-Duty Policy was implemented in the form of General Order Q-23. (*See* Malone Affidavit ¶ 8.) General Order Q-23 provides that "[a]ll sworn members of the Department are required to be capable of performing the full duties and law enforcement responsibilities of a sworn member to include the ability to make forceful arrests, to drive vehicles under emergency conditions, and to qualify with a weapon." (*Id.* at ¶ 9.) It indicates that while there are no permanent light-duty positions within the Department, a limited number of light-duty assignments are available on a temporary basis—not to exceed 12 months— to accommodate officers who are ill, injured, or under disciplinary investigation. (*Id.*) In addition, General Order Q-23 requires that any police officer who the Public Safety Infirmary ("PSI") determined is medically unqualified for full-duty status must apply for retirement benefits or return to full-duty status within a specific amount of time. (*Id.*)

General Order Q-23 allows an officer to dispute any PSI determination that he is medically unqualified for full-duty status. (Malone Affidavit ¶ 9.) If the Police Department receives written certification from the officer's private physician that the officer is qualified to return to full-duty status or

will be qualified to return to full-duty status within a reasonable period of time, then PSI must review the certification. (*Id.* at Ex. 1, p. 1.) If PSI agrees with the physician's certification, the officer will be returned to full-duty status. (*Id.*) If PSI disagrees with the certification, the officer and his private physician will confer with PSI and attempt to resolve the disagreement. (*Id.*) If no resolution is reached, the matter is referred to a mutually agreed-upon independent physician. (*Id.*) The medical director of PSI, however, makes the final determination regarding the officer's qualification to return to full-duty status. (*Id.*)

After General Order Q-23 was implemented, the Fraternal Order of Police, the Police Department, and the Labor Commissioner's Office discussed how and when General Order Q-23 would be administered. (Malone Affidavit ¶ 10.) It was agreed that police officers would not be required to apply for retirement until City Council Bill 04-1545 was signed into law. (*Id.* at ¶ 11.) This bill, which was signed into law in December 2004, allowed police officers to file an application for a line-of-duty disability retirement benefit even if the officer could not satisfy the five-year-from-date-of-injury filing requirement. (*Id.*) City Council Bill 04-1545 was drafted by the Police Department, the Fraternal Order of Police, the Baltimore Police and Fire Pension System, the City Solicitor's Office, and the Labor Commissioner's Office. (*Id.*)

In January 2005, the Police Department sent letters to those police officers whom PSI determined were permanently unable to perform the duties of a

police officer. (Malone Affidavit ¶ 13.) These letters stated:

> As you are aware, the Public Safety Infirmary has determined that you are unfit for duty as a police officer. Pursuant to General Order Q-23, Maintenance Program for Limited/Light Duty Personnel ("Policy"), which became effective on August 17, 2004, you must take appropriate steps to separate yourself from the Police Department through retirement or other avenues. The Policy requires that you either file for retirement benefits or make other arrangements to separate from the Department. Your failure to do either will result in your employment with the police department being involuntarily terminated. A copy of the Policy is enclosed.
>
> Please be further advised that, under the Policy, to the extent that you are currently assigned to a light duty position, your tenure in that position is temporary, not permanent, as the Policy has abrogated the Police Department practice of assigning personnel to permanent, fulltime, light duty jobs which are within the job classification of police officer. Consequently, any duties that you may carry out in a light duty capacity are no longer being performed as a police officer.

(Pls' Mot. Ex. 1.) The letters also summarized the disability retirement benefits available under City Council Bill 04-1545. (*Id.*)

In March 2005, as a result of negotiations among the Police Department, the Fraternal Order of Police, and the Labor Commissioner's Office, General Order Q-23 was amended and incorporated into the Fraternal Order of Police's contract with the City of Baltimore. (Malone Affidavit ¶¶ 14-15.) The following changes were made to General Order Q-23: First, any police officer determined by PSI to be medically unqualified for full-duty status has 12 months from the date of that determination to return to full-duty status. (*Id.* at ¶ 16.) Second, in the case of lineof-duty injuries, PSI will not make any such determination prior to 12 months from the original date of injury. (*Id.*) Third, if a police officer's application does not result in a pension benefit, the officer shall be retained as a police officer in their current classification until the officer qualifies for a retirement benefit of 50% of his highest 18 months salary. (*Id.*) Fourth, if a police officer's application results in a pension benefit, the officer shall retire. (*Id.*) Finally, the Fraternal Order of Police agreed not to encourage or finance litigation that seeks to challenge the revised version of General Order Q-23. (*See* Malone Affidavit Ex. 2, p. 3.)

II. Plaintiffs Allen, Bessling, Cichowicz, McKitrick, Clauss, and Niebuhr.

Plaintiff Steven W. Allen ("Allen") has been an officer with the Police Department since 1999. (*See* Am. Compl. ¶ 4.) In mid-2003, Allen tore his trapezius muscle. (*Id.*) Since that date, Allen has been unable to open a door, lift more than a few pounds, run, or sleep through the night. (*Id.*) In addition, household chores, such as cleaning,

vacuuming, taking out the garbage and walking the dog have become impossible. (*Id.*) Allen has held light-duty positions with the Police Department since mid-2003, was asked to apply for retirement benefits or return to fullduty status in accordance with General Order Q-23, and has filed or is in the process of filing for retirement benefits. (*See* Am. Compl. ¶ 4; Ambrose Affidavit ¶¶ 9-11.)

Plaintiff Bryan Bessling ("Bessling") has been an officer with the Police Department since 1980. (*See* Am. Compl. ¶ 5.) In the late 1980s, Bessling was diagnosed with diabetes. (*Id.*) In the 1990s, he was diagnosed with hypertension. (*Id.*) In 1998, he injured his rotator cuff and both knees. (*Id.*) In 2002, he was diagnosed with coronary heart disease and injured in a car accident. (*Id.*) Bessling cannot drive, run, walk more than four blocks, squat, kneel, sit for more than 15 minutes at a time, or stand for more than five to eight minutes at a time. (*Id.*) Bessling has held light-duty positions with the Police Department since early-2002, was asked to apply for retirement benefits or return to full-duty status in accordance with General Order Q-23, and has filed or is in the process of filing for retirement benefits. (*See* Am. Compl. ¶ 5; Ambrose Affidavit ¶¶ 9-11.)

Plaintiff Michael W. Cichowicz ("Cichowicz") has been an officer with the Police Department since 1984. (*See* Am. Compl. ¶ 6.) In 1991, he injured himself when he slipped and fell on duty. (*Id.*) Between 1991 and 2002, he had several surgeries on his knees, hips, and back. (*Id.*) In 2002, he broke the greater trochanter of his right hip. (*Id.*) Cichowicz cannot run, kneel, bend, squat, walk for more than

five minutes, sit or stand uninterrupted for more than 30 minutes, or lift more than five or ten pounds. (*Id.*) Cichowicz suffers from pain that tremendously interferes with his sleep. (*Id.*) Cichowicz has held light-duty positions with the Police Department since approximately September 2002, was asked to apply for retirement benefits or return to full-duty status in accordance with General Order Q-23, and has filed or is in the process of filing for retirement benefits. (*See* Am. Compl. ¶ 6; Ambrose Affidavit ¶¶ 9-11.)

Plaintiff William B. McKitrick ("McKitrick") has been an officer with the Police Department since 1993. (*See* Am. Compl. ¶ 8.) In 2001, he was diagnosed with ulcerative colitis. (*Id.*) In 2002, his large intestine was removed. (*Id.*) As a result, McKitrick must have immediate access to a restroom at all times. (*Id.*) McKitrick has held light-duty positions with the Police Department since early 2001, was asked to apply for retirement benefits or return to full-duty status in accordance with General Order Q-23, and has filed or is in the process of filing for retirement benefits. (*See* Am. Compl. ¶ 8; Ambrose Affidavit ¶¶ 9-11.)

Plaintiffs David F. Clauss ("Clauss") and Kevin Niebuhr ("Niebuhr") allege that "[i]n spite of several injuries, at all times, [they are] able and [were] performing the essential functions of a police officer." (*See* Am. Compl. ¶¶ 7, 9.) Clauss and Niebuhr have held light-duty positions with the Police Department, were asked to apply for retirement benefits or return to full-duty status in accordance with General Order Q-23, and have filed

or are in the process of filing for retirement benefits. (*See* Ambrose Affidavit ¶¶ 9-11.)

III. Procedural History.

On March 31, 2005, Plaintiffs filed a Complaint against Defendants in this Court.[2] On April 20, 2005, Defendants filed their Motion for

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[2] The initial complaint named 30 individuals, on behalf of themselves and others similarly situated, as plaintiffs in this case. Before the hearing, 23 plaintiffs voluntarily dismissed their claims against Defendants. At the hearing, counsel for Plaintiffs clarified that this matter is no longer being pursued as a class action and confirmed that another named plaintiff—Melissa D. Williams—also voluntarily dismissed her discrimination claims. As a result, only six plaintiffs remain in this case: Allen, Bessling, Cichowicz, McKitrick, Clauss, and Neibuhr.

Summary Judgment.[3] On June 24, 2005, Plaintiffs filed their Motion to Amend Complaint and Cross-Motion for Summary Judgment. On July 8, 2005, Defendants filed their Motion to Stay Consideration of Plaintiffs' Motion to Amend Complaint. At the February 10, 2006 hearing, this Court granted Plaintiffs leave to file their Amended Complaint.[4] Discovery has not been taken.

STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure when there is no genuine issue as to any material fact, and the moving party is plainly entitled to judgment in its favor as a matter of law. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court explained that, in considering a motion for summary

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[3] Although this motion is titled "Defendants' Motion for Summary Judgment," counsel for Plaintiffs (in papers filed with this Court) and counsel for Defendants (at the hearing) refer to this motion as a Motion to Dismiss Or, in the Alternative, for Summary Judgment. The Court treats this motion as one for summary judgment because Defendants' arguments require that the Court consider matters outside the pleadings. *See* Fed. R. Civ. P. 12(b); *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 949 (4th Cir. 1997).

[4] At the hearing, counsel for both parties represented that Plaintiffs' Amended Complaint does not affect the parties' pending cross-motions for summary judgment and Defendants withdrew their opposition to Plaintiffs' Motion to Amend Complaint. Plaintiffs' counsel explained that the purpose of amending their complaint is threefold: (1) identify the reduced number of plaintiffs in this case, (2) allege that Plaintiffs were "perceived as disabled" by the Department, and (3) clarify that Plaintiffs are no longer pursuing this matter as a class action or seeking injunctive relief.

judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Thus, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id.* at 252. In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom "in the light most favorable to the party opposing the motion," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *see also E.E.O.C. v. Navy Federal Credit Union*, 424 F.3d 397, 405 (4th Cir.2005). However, the opponent must bring forth evidence upon which a reasonable fact finder could rely, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The mere existence of a "scintilla" of evidence in support of the nonmoving party's case is not sufficient to preclude an order granting summary judgment. *Anderson*, 477 U.S. at 252.

As there are pending cross-motions for summary judgment, this Court applies the same standards of review. *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991); *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42, 45 n.3 (4th Cir. 1983) ("The court is not permitted to resolve issues of material facts on a motion for summary judgment—even where . . . both parties have filed cross motions

for summary judgment.") (emphasis omitted), *cert. denied*, 469 U.S. 1215 (1985). The role of the court is to "rule on each party's motion on an individual and separate basis, determining, in each case, whether a judgment may be entered in accordance with the Rule 56 standard." *Towne Mgmt. Corp. v. Hartford Acc. & Indem. Co.*, 627 F. Supp. 170, 172 (D. Md. 1985). "[B]y the filing of a motion [for summary judgment] a party concedes that no issue of fact exists under the theory he is advancing, but he does not thereby so concede that no issues remain in the event his adversary's theory is adopted." *Nafco Oil & Gas, Inc. v. Appleman*, 380 F.2d 323, 325 (10th Cir. 1967); *see also McKenzie v. Sawyer*, 684 F.2d 62, 68 n.3 (D.C. Cir. 1982) ("[N]either party waives the right to a full trial on the merits by filing its own motion."). However, when cross-motions for summary judgment demonstrate a basic agreement concerning what legal theories and material facts are dispositive, they "may be probative of the non-existence of a factual dispute." *Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983).

DISCUSSION

I. Defendants' Motion for Summary Judgment.

A. Standard Under ADA.

As a preliminary matter, it is unclear whether Plaintiffs' employment discrimination claims are

brought under Title I[5] or II[6] of the ADA or both. (*See, e.g.*, Am. Compl. ¶ 42 (alleging violation of Title II); Pls' Mot. pp. 10-11 (legal argument based on Title I).) Whether Title I or II governs discrimination claims is often contested because Title I incorporates administrative prerequisites that are not required under Title II. *See* 42 U.S.C. §§ 12117(a) & 2000e-5 (requiring that an employee file a charge of discrimination with the EEOC before filing a complaint in federal court).

This Court need not decide whether Title II of the ADA permits Plaintiffs to bring employment discrimination claims against the Police Department. First, Plaintiffs' compliance with Title I administrative prerequisites is no longer at issue.[7]

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[5] Title I of the ADA provides in relevant part: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

[6] Title II of the ADA provides in relevant part: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

[7] Plaintiffs' counsel represents that the EEOC has issued right-to-sue letters to each of the remaining Plaintiffs. At the hearing, Defendants agreed that their argument with respect to exhaustion of administrative remedies is now moot as to Plaintiff Niebuhr.

Second, although the United States Court of Appeals for the Fourth Circuit has not directly addressed the issue,[8] it has on at least one occasion allowed an individual to bring an employment discrimination claim under Title II of the ADA. *See Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995). Third, regulations promulgated under Title II adopt Title I standards for purposes of evaluating employment discrimination claims against public entities. *See* 28 C.F.R. § 35.140. Accordingly, this Court assumes without deciding that Plaintiffs may bring employment discrimination claims against the Police Department under Title II, and analyzes those claims under the language and precedent of Title I of the ADA. *See* 28 C.F.R. § 35.140.

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[8] There is a split among the United States Courts of Appeals who have considered whether employment discrimination claims against public entities are available under Title II. *See, e.g., Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 n. 1 (2001) (acknowledging split but declining to resolve whether "Title II of the ADA, dealing with the 'services, programs, or activities of a public entity,' 42 U.S.C. § 12132, is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject.") (citations omitted).

B. *Prima Facie* Case.

To establish a violation of Title I of the ADA or § 504 of the Rehabilitation Act ("RA"),[9] a plaintiff must show that (1) he has a disability, (2) he is otherwise qualified to receive the employment or benefit in question, and (3) he was excluded from the employment or benefit, or otherwise discriminated against, on the basis of his disability. *See Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005) (citing *Baird v. Rose*, 192 F.3d 462, 467-70 (4th Cir.1999); *Doe v. Univ. of Md*, 50 F.3d at 1264-65 & n. 9)).

Initially, there are genuine issues of material fact with respect to the questions of disability as they relate to each of the remaining six Plaintiffs in this case. (*Compare* Defs' Mot. p. 9 ("Plaintiffs are not 'disabled' within the meaning of the ADA because they admit—indeed, proudly assert—their ability to perform many jobs.") *with* Pls' Mot. p. 3 (submitting opinion from vocational expert that four Plaintiffs "are substantially limited in the major life activity of working in that they can perform only 11-

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[9] Section 504 of the RA provides in relevant part: "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794(a). *See also* 29 U.S.C. § 794(d) (adopting standards applied in Title I of ADA for purpose of determining "whether this section has been violated in a complaint alleging employment discrimination . . ."). Accordingly, this Court's analysis of Plaintiffs' claims under the language and precedent of Title I of the ADA applies with equal force to Plaintiffs' claims under the RA.

60.6% of the jobs available in the labor market.") and pp. 6-7 (alleging that all Plaintiffs were perceived as disabled by the Police Department).) Accordingly, viewing the facts in the light most favorable to Plaintiffs on Defendants' motion for summary judgment, this Court concludes that Plaintiffs have satisfied the first element of proof.

However, the precise issue in this case is whether Plaintiffs are "otherwise qualified" for the job of police officer. As a result, this Court must decide whether Plaintiffs could perform the essential functions of the job at issue, *i.e.*, functions that bear more than a marginal relationship to that job, and if not, whether any reasonable accommodation by the employer would enable them to perform those functions. *See* 42 U.S.C. § 12111(8); *Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 213 (4th Cir. 1994).

1. Essential Functions.

The essential functions of a job are the "fundamental job duties" of the position. 29 C.F.R. § 1630.2(n)(1). A job function may be considered essential because, among other reasons, the position exists to perform that function, there is a limited number of employees to whom that function can be assigned, or the function is so specialized that the employee was hired specifically to perform it. 29 C.F.R. § 1630.2(n)(2). Evidence of whether a particular function is essential includes:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630.2(n)(3).

Defendants' analysis on the issue of essential functions is guided by the factors set out in 29 C.F.R. § 1630.2(n)(3). For example, Defendants establish that the Police Department has determined that the "essential functions of a police officer include the ability to make forceful arrests, to operate a vehicle under emergency conditions and to qualify with a weapon." (Ambrose Affidavit ¶ 6.) Defendants note that the Police Department views these functions as essential at least in part because of fundamental "public and officer safety" concerns. (*See* Ambrose Affidavit ¶ 4.) These concerns led the Police Department to develop and implement the Light Duty Policy, which requires that, *inter alia*, all

officers be capable of making an arrest, operating a vehicle, and firing a weapon. (*See* Malone Affidavit ¶ 4.) Finally, Defendants point out that the Fraternal Order of Police has incorporated the Light-Duty Policy into its contract with the City of Baltimore. (*See* Malone Affidavit ¶ 15.)

Defendants also emphasize this Court's prior decision in *Champ v. Baltimore County*, 884 F. Supp. 991 (D. Md. 1995), the facts of which are remarkably similar to this case. In 1976, an off-duty motorcycle accident rendered Baltimore County police officer James Champ's upper left arm useless. *Id.* When Champ returned to work later that same year, and for the 16 years that followed, he was assigned to various light-duty positions because of his arm. *Id.* In 1992, the Chief of Police determined that budgetary constraints required removing those officers who could not perform the full duties of a police officer. *Id.* As a result, all officers who had remained on light-duty assignment for more than 251 days were given the right to seek medical retirement, service retirement, a transfer into another position with the County service, a leave of absence, or resignation. *Id.* In 1992, Champ was placed on disability retirement. *Id.*

Champ's suit alleged that the Baltimore County Police Department violated the ADA and RA by placing him on disability retirement due to the loss of use of his left arm. *Champ*, 884 F. Supp. at 991. This Court found that Champ failed to establish a *prima facie* case under the ADA or RA because he could not prove that he was "otherwise qualified" for the job in question. *Id.* at 1000. In particular, the

Court found that no genuine dispute existed with respect to Champ's inability to perform the essential functions of a police officer in Baltimore County, which included making a forcible arrest, driving a motor vehicle under emergency conditions, and qualifying with a weapon. *Id.* at 996-98. Defendants argue that the instant case is governed by this Court's prior decision in *Champ* and that, as a result, summary judgment for Defendants is appropriate.

Plaintiffs' primary response to these arguments is that discovery is needed to determine which job functions are essential in this case.[10] Plaintiffs emphasize that "'[w]hether a particular function is essential is a factual determination that must be made on a case by case basis.'" *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 279 (3rd Cir. 2001) (quoting 29 C.F.R. pt. 1630, App. 1630.2(n)). Plaintiffs also note that *Champ* and similar cases are "instructive at best in what remains a fact and circumstances-specific inquiry; they are not 'precedents' prescribing the essential qualifications for employment as a police officer." *King v. Town of Wallkill*, 302 F. Supp. 2d 279, 290 (S.D.N.Y. 2004). Finally, Plaintiffs submit an affidavit pursuant to

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[10] Plaintiffs maintain that the essential functions analysis in this case should focus on the functions of the light-duty positions to which Plaintiffs were reassigned, not on the position of police officer. The Court rejects this argument in light of the Police Department's requirement that *all* police officers, even those in administrative or supervisory positions, must be capable of making an arrest, driving a vehicle, and firing a weapon. Accordingly, the relevant inquiry in this case is the fundamental duties of the job of police officer. *Cf. Champ*, 884 F. Supp. at 998 n. 3.

Fed. R. Civ. P. 56(f) in an attempt to set out reasons for allowing discovery on this and other matters. (*See* Pls' Mot. Ex. 18.)

After carefully considering Plaintiffs' arguments, caselaw, and Rule 56(f) affidavit, this Court finds that discovery on this matter would not lead to any genuine issues of material fact and is therefore unnecessary. Accordingly, for reasons explained below, this Court denies Plaintiffs' request for such discovery. *See Strag v. Board of Trustees*, 55 F.3d 943, 954 (4th Cir. 1995) (denial of Rule 56(f) motion generally appropriate "where the additional evidence sought for discovery would not have by itself created a genuine issue of material fact sufficient to defeat summary judgment."); *see also Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.")

First, Plaintiffs do not challenge critical evidence submitted by the Defendants on the matter of essential functions. For example, Plaintiffs do not dispute that, in the judgment of the Police Department, the essential functions of a police officer include making a forcible arrest, firing a weapon of deadly force, and driving a vehicle under emergency conditions. *Cf.* 29 C.F.R. § 1630.2(n)(3) (employer's judgment relevant to determination of essential functions). Likewise, it is undisputed that the Fraternal Order of Police has incorporated the Light-Duty Policy into its contract with the City of Baltimore. (*See* Malone Affidavit ¶ 15.) *Cf.* 29 C.F.R.

§ 1630.2(n)(3) (collective bargaining agreement relevant to determination of essential functions). Finally, Plaintiffs do not take issue with the Police Commissioner's authority to determine the physical qualifications for serving as a police officer by, for example, requiring that all officers, even those in supervisory or administrative roles, be capable of full-duty deployment. *Cf.* 29 C.F.R. § 1630.2(iii)-(iv) & (v)(vi) (work experience, time performing function, and consequences of not requiring function are relevant to determination of essential functions).

Second, this Court finds that the discovery requested by Plaintiffs would not give rise to any genuine issues of material fact on the matter of essential functions. Plaintiffs' requests generally fall into two categories: discovery related to the Police Department's *application* of its requirement that all officers be able to make forceful arrests, drive vehicles under emergency conditions, and qualify with a weapon, and discovery related to *job descriptions* for the position of police officer in Baltimore City.[11] The first category—concerning the application of standards—is designed to address whether Police Department policies are a pretext for

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[11] This Court finds that Plaintiffs' other requests for discovery—on such topics as the Police Department's increased use of helicopters, use of lighter weapons, and greater reliance on the U.S. Armed Forces and organizations such as the FBI since the 9/11 attacks—concern information that is irrelevant and unnecessary to the issues in this case.

excluding disabled individuals.[12] Accordingly, Plaintiffs seek to discover the number of officers who have not had to make forcible arrests, fire weapons, or operate a vehicle under emergency conditions in the course of their day-to-day duties over the past 15 years. (*See* Rule 56(f) Affidavit, p. 2.) This type of discovery, however, would not lead to any genuine disputes. The issue in this case is whether officers are *capable* of performing certain fundamental job functions, not whether they have in fact been required to do so. Even if discovery showed that police officers working in administrative positions were never called upon to make forcible arrests, that fact would not be material to any reasonable jury's determination of the fundamental job duties of a police officer in Baltimore City. No reasonable jury could find that the Police Department exceeded the broad bounds afforded it under the ADA to decide as an employer that being capable of making forcible arrests, driving vehicles under emergency conditions, and firing weapons of deadly force are essential qualifications for serving as a police officer.

The lack of any need for discovery on the application of Police Department policies and standards is confirmed by evidence submitted by

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[12] 12 Solely for purposes of evaluating Plaintiffs' Rule 56(f) affidavit as it relates to the application of Police Department standards, this Court assumes that Plaintiffs can satisfy their initial burden of proving a *prima facie* case under the ADA and thereby reach the issue of pretext. *See Ennis v. National Ass'n of Business and Educational Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995) (applying *McDonnell Douglas* burden-shifting framework to wrongful discharge claim brought under the ADA).

Plaintiffs. For example, an affidavit from Plaintiff Niebuhr provides that full duty officers working in light duty capacities "had to perform one tour of duty approximately every so often." (Niebuhr Affidavit ¶ 5.) Another affidavit, this one from Plaintiff McKitrick, states that since receiving letters describing General Order Q-23, "approximately 50 or so officers returned from light duty to full duty." (McKitrick Affidavit ¶ 26.) These affidavits confirm that officers are sometimes redeployed in a full-duty capacity even when working in a light-duty capacity, and that the Light-Duty Policy was not a mere pretext for eliminating all officers working in a light duty capacity.

The second category of requested discovery—concerning job descriptions—also would not give rise to any genuine issues of material fact. First, there is no dispute that the Light Duty Policy "has abrogated the Police Department practice of assigning personnel to permanent, full-time, light duty jobs which are within the job classification of police officer." (Pls' Mot. Ex. 1.) Second, Plaintiffs present no argument, caselaw, or other support to suggest that the Commissioner lacks the authority to determine that officers working in a light-duty capacity must return to work as full-duty police officers or retire, or that all police officers must be capable of performing certain fundamental job duties. As a result, even if discovery showed that the Police Department provided permanent, light-duty "police officer" positions before the Light-Duty Policy was implemented, that fact would not be material to any determination of the fundamental job duties of a police officer in this particular case. Again, discovery

would simply not lead to evidence from which a reasonable jury could conclude that the Police Department exceeded its authority under the ADA by deciding that making forcible arrests, driving vehicles under emergency conditions, and firing weapons of deadly force are fundamental to the job of police officer. Accordingly, this Court denies Plaintiffs' request under Fed. R. Civ. P. 56(f) for discovery on the matter of essential functions.[13] *Strag*, 55 F.3d at 954; *Anderson*, 477 U.S. at 248.

There is no dispute with respect to the authority of the Police Commissioner to make decisions regarding personnel matters. Furthermore, there is no dispute that the determination of the essential functions included input from the Fraternal Order of Police. The Plaintiffs have failed to demonstrate a need for discovery on the matter of essential functions. Accordingly, this Court finds that no genuine dispute exists with respect to the essential functions of a police officer in Baltimore City, *i.e.*, making a forcible arrest, driving a motor vehicle under emergency conditions, and qualifying with a weapon.

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[13] The parties in the *Champ* case conducted discovery before filing cross-motions for summary judgment. *See Champ*, 884 F. Supp. at 994 & 997. In contrast, the parties in this case filed cross-motions for summary judgment before conducting any discovery. Given the undisputed facts in this case and the Plaintiffs' failure to demonstrate any need for discovery on the matter of essential functions, summary judgment is appropriate despite the early procedural stage of this case.

2. Plaintiffs' Ability To Perform Essential Functions.

It is undisputed that three Plaintiffs—Allen, Bessling, and Cichowicz—cannot perform the essential functions of a Baltimore City police officer. (*See*, *e.g.*, Pls' Mot. pp. 3-6 & Exs. 3, 4, 7 & 9.)[14] With respect to the remaining Plaintiffs—Clauss, Niebuhr, and McKitrick—this Court finds that, for reasons explained below, there is no genuine dispute that they are each incapable of performing the fundamental job duties at issue here.

In Plaintiffs' initial complaint, Clauss, Niebuhr, and McKitrick allege physical limitations that would prevent them from making a forcible arrest, driving a motor vehicle under emergency conditions, and qualifying with a weapon. For example, Clauss contends that, after two operations on his back and a heart attack, he is left short of breath by excessive exertion, experiences difficulty lifting, and sometimes suffers from confusion.

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[14] Plaintiffs Bessling and Cichowicz state in direct terms that they cannot perform the essential functions of a police officer. (*See* Bessling Affidavit ¶ 8 ("I am unable to make a forcible arrest, drive a vehicle under emergency conditions or fire a weapon."); Cichowicz Affidavit ¶ 21 ("I am unable to make a forcible arrest.").) Although Plaintiff Allen does not explicitly aver that he cannot perform these functions, Plaintiffs do not dispute that he is incapable of making a forcible arrest, driving a vehicle, or firing a weapon. (*See*, *e.g.*, Pls' Mot. pp. 3-6.) Allen's description of his physical limitations, moreover, places his inability to perform the fundamental job duties at issue here beyond reasonable dispute. (*See*, *e.g.*, Allen Affidavit ¶¶ 5 ("I can't lift at all.") & 6 ("I am unable to perform any job involving physical labor.").)

(Compl. ¶ 12.) Niebuhr asserts that, after falling down a flight of stairs and injuring his lower back and right elbow, he cannot run fast, must take frequent breaks at work to alternate between sitting and standing, cannot walk far, has great difficulty driving, cannot perform most housework, sometimes only gets three to four hours of sleep, and cannot carry heavy items. (*Id.* at ¶ 24.) McKitrick asserts that his large intestine was removed after being diagnosed with ulcerative colitis, and that severe fecal urgencies require that McKitrick be near a bathroom at all times. (*See* Compl.¶ 21; McKitrick Affidavit ¶¶ 16-20.) As a result, McKitrick reports great difficulty in driving, severe sleep problems, and a substantially limited ability to perform daily activities and manual tasks. (*Id.*)

In documents submitted after Defendants filed their Motion for Summary Judgment, however, Plaintiffs made substantially different allegations. For example, Clauss and Niebuhr allege in an amended complaint and separate affidavits that "[i]n spite of several injuries, at all times, [they are] able and [were] performing the essential functions of a police officer." (Am. Compl. ¶¶ 7, 9; *see also* Clauss Affidavit ¶ 11; Niebuhr Affidavit ¶ 3.) Similarly, McKitrick contends that he is "able to make a forcible arrest, drive a vehicle under emergency conditions, or fire a weapon." (McKitrick Affidavit ¶ 6.) Finally, Niebuhr's doctor opines that although there is nothing precluding Niebuhr from operating a weapon or driving a vehicle in emergency conditions, additional information is needed to determine whether Niebuhr can make a forceful arrest. (*See* McGovern Affidavit ¶ 4.)

After carefully reviewing Plaintiffs' amended complaint and the accompanying affidavits, this Court finds that there is no genuine issue of material fact with respect to Clauss, Niebuhr, and McKitrick's inability to perform the essential functions of a police officer. First, neither Clauss, Niebuhr, nor McKitrick disclaim any of the specific physical limitations that they alleged in Plaintiffs' initial complaint.[15] Second, simply stating in pleadings and affidavits that they are able to perform the essential functions of a police officer, without specific facts to support such statements, is conclusory and insufficient to establish a genuine issue of material fact. *See, e.g., Guinness PLC v. Ward*, 955 F.2d 875, 901 (4th Cir. 1992) ("the mere placement of . . . conclusory allegations and speculative assertions into affidavits or declaration without further legitimate support clearly does not suffice" to overcome summary judgment); *Lujan v. Nat'l*

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[15] Plaintiffs do not dispute that they decided to file for retirement benefits instead of requesting that the Police Department reconsider its assessment that Plaintiffs are unable to perform the essential functions of a police officer. (*See* Ambrose Affidavit 10; Malone Affidavit Ex. 2.) General Order Q-23 created a process for allowing Plaintiffs to dispute any determination made by the Public Safety Infirmary that the Plaintiffs are medically unqualified for full-duty status. *See*, BACKGROUND, § I, *supra*. Plaintiffs have submitted evidence, moreover, establishing that numerous officers working in a light-duty capacity took advantage of this process. (*See* McKitrick Affidavit ¶ 26 (averring that, since receiving letters describing General Order Q-23, "approximately 50 or so officers returned from light-duty to full duty.").) Plaintiffs cannot now blame Defendants for failing to reconsider their physical limitations when Plaintiffs decided to forgo such reconsideration in order to pursue retirement benefits. *Cf. Champ*, 884 F. Supp. at 997 n. 2.

Wildlife Fed'n, 497 U.S. 871, 889 (1990) ("replac[ing] conclusory allegations of the complaint... with conclusory allegations of an affidavit" insufficient to overcome summary judgment).

Finally, this Court finds that the affidavit from Dr. Kevin McGovern—Niebuhr's private physician—fails to establish a genuine issue with respect to Niebuhr's ability to make a forcible arrest. Although Dr. McGovern opines that Niebuhr is capable of firing a weapon and driving a vehicle under emergency conditions, Dr. McGovern states that, with respect to making a forcible arrest, he "need[s] more information with respect to that which the police department categorizes 'forcible' before I could render an opinion." (McGovern Affidavit 4.) In light of Niebuhr's undisputed physical limitations—including the fact that Niebuhr cannot run fast, cannot walk far, cannot perform most housework, cannot carry heavy items, and must take frequent breaks at work to alternate between sitting and standing—this Court concludes that no reasonable jury could find that Niebuhr is capable of making a forcible arrest. Accordingly, for the reasons stated above, this Court finds that there is no genuine issue that each of the Plaintiffs are unable to perform the essential functions of a Baltimore City police officer.

3. Reasonable Accommodation.

Under the ADA, an employer is required to make "reasonable accommodations" to the known physical or mental limitations of a qualified disabled individual unless the accommodation would impose an undue hardship on the operation of the business.

42 U.S.C. § 12112(b)(5)(A). A reasonable accommodation may include "job restructuring, part-time or modified work schedule, reassignment to a vacant position, [and] acquisition or modification of equipment or devices. . . ." 42 U.S.C. § 12111(9)(B).

In this case, the accommodation that Plaintiffs seek is limited to "allowing plaintiffs to continue to work in their permanent, light duty positions." (*See, e.g.*, Am. Compl. ¶¶ 40(d) & 42(d).) This is not a "reasonable accommodation" because permanent, light-duty positions would effectively eliminate the essential functions of making a forcible arrest, operating a vehicle under emergency conditions, and firing a weapon. *See, e.g., Hall v. U.S. Postal Service*, 857 F.2d 1073, 1078 (6th Cir. 1988) (accommodation is "unreasonable if it requires elimination of an essential duty."); *see also Hill v. Harper*, 6 F. Supp. 2d 540, 544 (E.D. Va. 1998) (jail deputy's request for accommodation by permanently placing him in control room unreasonable because it "eliminated the 'essential function' of being able to rotate through the various duty posts"); *Johnson v. State of Md.*, 940 F.Supp. 873, 878 (D. Md. 1996) (correctional officer's request for limited duty accommodation unreasonable in part because correctional officer's inability to use a firearm to help control the prison population threatens safety of other correctional officers and the public.) (citing *Champ*, 884 F. Supp. at 995). Accordingly, this Court concludes that no reasonable jury could find that Plaintiffs are "otherwise qualified" individuals with a disability entitled to protection under the ADA.

II. Plaintiffs' Cross-Motion for Summary Judgment.

Plaintiffs argue that they are entitled to judgment as a matter of law based on the following argument:

> [T]he proper actions for the city would have been on a case by case basis to determine that which each officer they perceived as disabled would have been able to perform and whether an accommodation could have been made on an individual basis. This would have resulted undoubtedly, in at least seven officers retaining their jobs on a permanent basis. Instead, the city didn't do that. They closed the entire department . . . They lumped all officers who they perceived as "disabled" into one broad category and used an "essential functions" argument regarding duties not required of these officers for a number of years. That is a blatant violation of the ADA.

(Pls' Mot. p. 21.) Plaintiffs' argument fails at a basic level because it assumes that the essential functions at issue relate to the light-duty positions that Plaintiffs occupied before the Light-Duty Policy, not the job of police officer. This analysis is mistaken for reasons explained above. *See* DISCUSSION § I.B.1.

In addition, this Court rejects Plaintiffs' misguided contention that Defendants failed to make a case-by-case assessment. The ADA mandates an individualized inquiry in determining whether an employee's disability or other condition disqualifies

him from a particular position. *See* 29 C.F.R. Pt. 1630, App., Background. In their motion for summary judgment, Defendants established that this individualized inquiry was made *with respect to Plaintiffs' ability to perform the job of police officer*. For example, each of the Plaintiffs was sent a letter in January 2005 that began: "As you are aware, the Public Safety Infirmary has determined that you are unfit for duty as a police officer." (Pls' Mot. Ex. 1; Malone Affidavit 13; *see also* Ambrose Affidavit 10 (averring that all of the Plaintiffs "have been determined to be medically unfit to perform the full duties of police officers by PSI . . .").) Plaintiffs do not contest these claims. Instead, Plaintiffs allege that Defendants failed to make a case-by-case assessment *with respect to Plaintiffs' ability to perform the light-duty positions that Plaintiffs occupied before the Light-Duty Policy*.[16] Accordingly, this Court finds that there is no genuine dispute that Defendants have complied with the ADA's mandate of individualized inquiry in determining whether Plaintiffs' physical limitations disqualified them from the position of police officer. *See* DISCUSSION §§ I.B.1 (relevant functions are those of police officer, not light-duty positions) & I.B.2 (Plaintiffs

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[16] Plaintiffs' focus on light-duty positions is clear from their moving papers and affidavits. For example, Plaintiffs allege that "no City official ever called . . . any of the light duty officers, sat them down, one by one, reviewed each individual officer's limitations, and attempted to match that officer up with either an accommodation or assessing whether that officer could continue in light duty." (Pls' Mot. p. 19.) Similarly, Plaintiff McKitrick contends that the Police Department "never attempted to determine how many light duty positions doing police work could remain open on a permanent basis." (McKitrick Affidavit ¶ 25.)

decided to file for retirement benefits instead of requesting that the Police Department reconsider its assessment that each Plaintiff cannot perform essential functions), *supra*.

Ultimately, Plaintiffs' case fails because it refuses to recognize the authority of the Police Department to manage its personnel and internal operations:

> The laws of the State of Maryland and the City of Baltimore, as well as well-established public policy, recognize that government employers, especially police departments, must have wide discretion and control over the management of their personnel and internal operations. This is particularly true in a police department, a paramilitary department, where internal discipline and public safety require that a police commissioner be afforded broad discretion and authority to assign and reassign members of the department to various posts.

Zombro v. Baltimore City Police Dept., 868 F.2d 1364, 1369-70 (4th Cir. 1989) (declining to recognize a § 1983 remedy in an age discrimination case). The ADA does not prevent the Police Commissioner from implementing the employment standards at issue in this case, provided of course that resulting decisions are made on a case-by-case basis and not on the basis of impairments. *See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490-91 ("By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical

criteria. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity."). In this case, there is no genuine dispute that the Police Department's employment decisions were made on the basis of reasonable physical criteria applied on an individualized basis. As a result, no reasonable jury could find that the Police Department—by determining that police officers working in light-duty capacities must return to work as full-duty officers or retire, or that all police officers must be capable of making arrests, operating vehicles under emergency conditions, or firing a weapon of deadly force—exceeded the broad bounds afforded the Police Department under the ADA.

CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment is GRANTED and Plaintiffs' Cross-Motion for Summary Judgment is DENIED. A separate Order and Judgment follows.

Dated: February 22, 2006

/s/
Richard D. Bennett
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[ENTERED FEBRUARY 22, 2006]

STEVEN ALLEN, *et al.*,

Plaintiffs,

v.

LEONARD HAMM, *et al.*,

Defendants.

Civil Action No.: RDB 05-879

ORDER AND JUDGMENT

For the reasons stated in the foregoing Memorandum Opinion, IT IS this 22nd day of February 2006, HEREBY ORDERED that:

1. The Motion for Summary Judgment filed by Defendants Leonard Hamm, Commissioner of the Baltimore City Police Department, Sean Malone, Interim Labor Commissioner of Baltimore City, George Balog, Director of the Department of Public Works, the Baltimore City Police Department, the Mayor of Baltimore, and the City Council of Baltimore ("Defendants") (Paper No. 8) is GRANTED;

2. The Cross-Motion for Summary Judgment filed by Steven Allen, Bryan Bessling, Michael Cichowicz, William McKitrick, David Clauss, and Kevin Niebuhr ("Plaintiffs") (Paper No. 17) is DENIED;

3. Judgment is ENTERED in favor of Defendants and against Plaintiffs;

4. Copies of this Order and the foregoing Memorandum Opinion shall be sent to counsel of record; and

5. The clerk of the court shall CLOSE this case.

/s/
Richard D. Bennett
United States District Judge

(2)

No. 07-168

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

RANDY W. BLADES, et al.,

Petitioners,

v.

LEONARD HAMM, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court grant certiorari to review Petitioners' claim that the Americans with Disabilities Act requires a police department to provide permanent light duty positions for officers who are medically unfit to perform the essential functions of the job?

2. Should the Court grant certiorari to review whether Rule 56 of the Federal Rules of Civil Procedure violates the Constitution of the United States of America?

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, the Mayor and City Council of Baltimore, the Baltimore Police Department, former Police Commissioner Leonard Hamm, and former Legal Counsel Sean Malone, request that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit in this case.

INTRODUCTION/COUNTER STATEMENT

The essential functions of Baltimore City police officers are outlined in the Public Local Laws of Maryland. PUBLIC LOCAL LAWS OF MD., ART. 4, § 16-2(a). Section 16-2(a) specifically charges members of the Department with preserving the public peace, detecting and preventing the commission of crime, apprehending and arresting criminals and persons who violate or are lawfully accused of violating the law, preserving the order at public places, and maintaining the orderly flow of traffic on public streets. An officer may be assigned other tasks, but pursuing and arresting lawbreakers is the fundamental responsibility of a police officer.

In January 2004, the Baltimore Police Department ("BPD" or "the Department") had 169 police officers, representing 5% of its sworn members, working in a light duty capacity. Having such a large number of officers unavailable for law enforcement deployment compromises the Department's core

mission. Consequently, the Department set about to clarify that there are no permanent light duty positions for police officers. After two years of negotiations with the Fraternal Order of Police ("FOP"), the labor organization for City police officers, the Department adopted a new general order effective March 25, 2005.

The policy has a comprehensive process to address the needs of those officers who, after examination by the City's Public Safety Infirmary ("PSI"), are deemed permanently unfit for full duty and unable to perform the essential functions of a police officer. Officers have twelve months to recover and assume the full duties of a police officer or complete the appropriate procedure to separate themselves from the Department through retirement. Retiring officers who wish to remain employed by the Department may apply for contractual positions for retirees or request employment as fulltime civilian employees.

Petitioners, all of whom had worked light duty for significant periods of time, filed an action on March 31, 2005 seeking a temporary restraining order and preliminary injunction claiming that the BPD's policy violated the Rehabilitation Act, 29 U.S.C. § 794(a) and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12188(a).

The United States District Court for the District of Maryland denied the requested injunctive relief because the Petitioners demonstrated no irreparable

injury. On April 20, 2005, the Department filed a motion for summary judgment and, subsequently, Petitioners filed a cross-motion for summary judgment. After a hearing on the parties' cross-motions on February 10, 2005, the District Court ruled in favor of Respondents by a decision and order dated February 22, 2006. The District Court found that Petitioners failed to make a prima facie case under the ADA because, by their own admission, they are unable to perform the essential functions of the job of police officer.

Petitioners filed an appeal to the United States Circuit Court of Appeals for the Fourth Circuit. The Court issued a per curiam opinion on May 10, 2007 affirming the decision of the District Court.

Petitioners fail to present any compelling reason why their request for a writ of certiorari should be granted. *See,1* Supreme Court Rule 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.") There is no split among the circuits, as Petitioners' claim, with respect to the application of the ADA's regulations on offering existing vacancies as a reasonable accommodation. Furthermore, Petitioners' raise for the first time before this Court the baseless assertion that Fede -l Rule of Civil Procedure 56 is unconstitutional.

Because the issues presented are not worthy of review and because the controversy was correctly decided below, the writ should be denied.

ARGUMENTS FOR DENYING THE WRIT

I. THERE IS NO SPLIT AMONG THE CIRCUITS ON THE ISSUE OF REASSIGNMENT TO VACANT POSITIONS UNDER THE ADA.

The ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual. . . . " 42 U.S.C. § 12112(a). To make a colorable ADA claim, a complainant must be able to show that: he has a disability; is a qualified individual who is able to perform the essential function of the job, with or without reasonable accommodation; and has suffered an adverse employment decision. 42 U.S.C. § 12112. A reasonable accommodation may include: "job restructuring, part-time or modified work schedule, reassignment to a vacant position, [and] acquisition or modification of equipment or devices . . . " 42 U.S.C. § 12111(9)(B); *see also,* 29 C.F.R. § 1630.2(o)(2)(ii). In the instant case, the BPD complied with this requirement because the retiring officers who wished to remain employed by the BPD were given the opportunity to apply for a contractual position for retirees or request employment as fulltime civilian employees.

In an attempt to manufacture a split among the circuits, Petitioners misrepresent the state of the law regarding reasonable accommodation. Petitioners assert that the Fourth Circuit is not following the law as noted above that defines reasonable accommodation. However, Petitioner cites Fourth Circuit cases decided *before* the passage of 29 C.F.R. § 1614.23, which provides that a reasonable accommodation may include reassignment to a vacant position. *See, Gile v. United Airlines, Inc.*, 95 F.3d 492, 498 (7th Cir. 1996) ("Those courts which have found that reassignment to a different position cannot be a reasonable accommodation under the ADA mistakenly rely upon preamendment Rehabilitation Act cases stating that proposition under the Rehabilitation Act. *See, Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995) (citations omitted)); *accord Scott v. Montgomery County Government*, 164 F. Supp. 2d 502, 507-08 (D. Md. 2001).

In fact, Petitioners cite no Fourth Circuit case that rejects the federal law on transfer to vacant positions. *See, e.g., Lassiter v. Reno*, 1996 WL 281933, *7 n.5 (4th Cir. 1996) ("Effective October 1, 1992, federal agencies are required to reassign disabled employees to suitable, funded, vacant positions located in the same commuting area provided the reassignment does not impose undue hardship on the operation of the program. *See,* 29 C.F.R. § 1614.203(g) (1995)".)

Throughout this litigation, Petitioners have sought to convince a court that the ADA requires the Department to create and maintain permanent light

duty jobs, at full pay, for individuals who, by their own admissions, cannot perform the duties of a police officer. *See generally,* Br. 16-18. However, as the court below found, the law is clear that an employer need not maintain permanent light duty positions as a "reasonable accommodation" under the ADA. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).

In public safety agencies, the number of employees seeking light duty assignments can grow quickly, because of the high risk of physical and psychological injury. The more officers serving in a limited light duty capacity, the fewer available officers there are for direct law enforcement operations. Under Petitioners' ADA analysis, a police department would be rendered powerless to act, even if all members of a police force were unfit for full duty.

Petitioners' petition for writ of certiorari should be denied because there is no split among the circuits with respect to the application of the ADA's regulations on reasonable accommodation.

II. FEDERAL RULE OF CIVIL PROCEDURE 56 DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

A. Petitioners raise a challenge to the use of Rule 56 for the first time in their petition for certiorari.

For the first time in their petition, Petitioners argue that the application of Rule 56 of the Federal Rules of Civil Procedure is unconstitutional. Br. 19.

This argument is particularly curious because the case was before the United States District Court for the District of Maryland on *cross-motions* for summary judgment.

Petitioners cite no case law to support their novel legal theory, but cite a law review article by a law professor at the University of Cincinnati College of Law to support their claim that Rule 56 is unconstitutional. Br. 26. It is well settled that judgment on the pleadings does not violate the constitution. *Weisgram v. Marley Co.*, 528 U.S. 440, 453 n.10 (2000) (court may order entry of judgment as a matter of law on sufficiency-of-the-evidence grounds without violating the Seventh Amendment's jury guarantee); *Neely v. Martin K. Eby Const. Co.*, 217 U.S. 475, 487 (1967) (rule providing for judgment n. o. v. does not violate Seventh Amendment's guarantee of jury trial); *Souffront v. La Compagnie Des Sucreries De Porto Rico*, 217 U.S. 475, 487 (1910) (court does not usurp province of the jury in rendering judgment upon the pleadings); *Fidelity & Deposit Co. of Maryland v. U.S.*, 187 U.S. 315, 321 (1902) (right to trial by jury not denied by rule authorizing judgment for want of a sufficient affidavit of defense). In fact, this court has reviewed and affirmed many ADA cases decided on summary judgment. *See, e.g., US Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 805-06 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 525 (1999).

Petitioners' challenge to the constitutionality was not raised or considered by the lower courts. Rather, at the Fourth Circuit, Petitioners argued that the trial court erred in not granting their cross-motion for summary judgment because the Department failed to conduct a case-by-case determination as to each of the Petitioners' need for accommodation.

Because the issue was not raised below, it is not properly before this Court. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954) (the Supreme Court will not undertake to review what the court below did not decide.) *U.S. v. New York Telephone Co.*, 326 U.S. 638, 651, n.18 (1946) (argument regarding application of the group method of depreciation would not be considered as it was not made until the case reached the Supreme Court.)

B. The lower courts applied the proper legal standard in granting Respondents' motion for summary judgment.

To make a colorable ADA claim, a complainant must be able to make a prima facie case, which demonstrates that he is disabled and qualified to perform the essential functions of the job, with or without reasonable accommodation. 42 U.S.C. § 12101 et seq., 29 C.F.R. § 1630.1 et seq. The lower courts found that Petitioners failed to set forth a prima facie case under the ADA because there was no dispute that they were unable to perform the essential functions of the job of police officer.

Petitioners argue at some length that the lower court failed to apply the proper legal standard and, therefore, summary judgment should not have been granted. Br. 21-23. The authority cited, however, has no application to the instant case because the petition cites cases in which the employee had *successfully* met its burden of making a prima facie case and the burden of proof had shifted to the employer. *Id.*

In the instant case, the District Court found that Petitioners failed to make a prima facie case of discrimination under the ADA, the facts were not in dispute and that Respondents were entitled to judgment as a matter of law. Petitioners' petition utterly fails to raise any issue that requires a review by this Court.

CONCLUSION

Because the petition fails to satisfy any criteria for justifying review by this Court and because the case was correctly decided below, Respondents request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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